



EXHIBIT 3
DATE 3/7/13 American Civil Liberties Union
HB 2 of Montana
P.O. Box 1317
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March 7, 2013

Dear Members of the House Appropriations Committee,

March 18th marks the 50th anniversary of a landmark 1963 Supreme Court decision known as *Gideon vs. Wainwright*. In *Gideon*, the U.S. Supreme Court established that competent, effective legal representation is essential to anyone seeking a fair trial. With *Gideon*, The U.S. Supreme Court established that if an indigent person is brought before the court facing the possibility of jail time, they are entitled to competent counsel.

In writing the decision in *Gideon*, Justice Hugo Black wrote:

"In our adversary system of criminal justice any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.... Lawyers in criminal courts are necessities, not luxuries... Legal representation is essential to a fair trial. The right of a person charged with crime to counsel may not be deemed fundamental in some countries. But it is in ours."

Thus, it is recognized as our Constitutional obligation that we must ensure that everyone charged with an offense that might be punishable by incarceration has access to effective defense counsel.

Montana's efforts to address this constitutional imperative culminated in 2005 with the passage of SB 146. The Bill was passed unanimously by the Senate and received 89% of the House's approval. The 2005 law created the Office of Public Defender (OPD). With the passage of HB 146, the OPD was charged with the responsibility of representing those indigent people charged with a felony or a misdemeanor for which there is a possibility of incarceration. The OPD was also charged with the obligation to handle appellate defense; to represent parents and children in dependency and neglect cases; to represent clients in cases involving involuntary commitment; to represent juveniles and more.

In the 9 years since its inception, the OPD has been chronically underfunded. To meet its constitutional and statutory mandate, in every year since 2005, the OPD has had to seek a supplemental authorization for funds in order to do what is expected of them. Some early supplemental requests addressed simple space and equipment needs for the new Department. However, most supplemental requests reflect the large increase in demand for OPD services. Using dependency and neglect cases as a small example - these cases were initially budgeted for \$700,000 annually. Today, they account for 12-15% of the total budget and cost in excess of \$3,000,000. This small example reflects continually increasing demand on the Program that can only be addressed by significant additional funding.

Currently, the Office of Public Defender suffers from unmanageable funding shortfalls which hinder its ability to meet its constitutional and statutory mandates. This shortfall also has a negative impact on our court system and the judicial process. For instance:



1. Courts are backlogged when hearings need to be delayed because public defenders have caseloads that are so demanding that they cannot keep up with the demands, expectations and professional obligations;
2. These delays cause waste judicial resources- judges, clerks, bailiffs, jurors.
3. Delays waste prosecutorial resources- county attorneys, witnesses, law enforcement.
4. Inadequate funding creates an uneven playing field with regard to access to investigators, social workers, expert witnesses and support staff.
5. This lack of funding and associated delays also costs County taxpayers more when County law enforcement is required to hold indigent detainees while they await trial.

The underfunding of the OPD inevitably hinders the OPD's ability to retain talented people. After more than 6 years of operation the average hourly pay for OPD lawyers is \$26.46 compared to \$35.04 for DOJ attorneys; OPD paralegals \$15.91 compared to \$18.62 at DOJ; and legal secretaries at OPD \$11.40 compared to \$15.20 at DOJ.

We can continue to ignore our constitutional obligations or we can begin to address them in deliberate ways. Discussions have already been had regarding the need for better pay and more FTE's at the OPD. While both remedies are necessary, The ACLU believes that dealing honestly with OPD caseloads is the real key to addressing the situation, key not just for OPD but for the entire justice system chain reaction of expenditures and delays.

As a taxpayer and citizen, I expect my elected officials to provide a system that meets our constitutional responsibilities and obligations, a system that provides timely professional representation, a system that works. Our Constitutional right to an adequate defense and the protection of liberty is at stake. I can't imagine any of us don't take that seriously.

For the coming biennium, OPD's original budget request was based on the best judgment from the OPD management team. It reflected the real indisputable needs of that office for them to get a reasonable chance at providing representation on a more level playing field for all those in need of their services. Currently this agency operates under an unsustainable organizational model. Organization requires infrastructure. For OPD to get right, these items are essential to be funded.

1. Commission Support. Commission is all volunteer but requires significant agency resources distracting the Chief, Bill Hooks, and Administrator Harry Freebourn from their other enormous responsibilities. 3 FTE @ \$197K.
 2. Deputy Director. The Chief's job responsibilities and demands of the position exceed any sustainable expectations to be filled by one employee. 1 FTE @ 107K.
 3. Accounts Receivable. 1 FTE @ \$42K.
 4. Conflict Coordinator. 2.5 FTE @ \$210K.
 5. Felony Investigators. 2 FTE @ \$139K.
 7. Social Workers. 6 FTE @ \$352K.
- Total - 23.5 FTE's \$7,392,000

CONTRACT ATTORNEYS

For decades, now the contract defense attorney rate has been set at \$60 per hour. Quality contract attorneys are essential to handling conflict situations or representation in sparsely populated parts of the state. The report issued by American University recommended that state public defenders receive the same compensation as federal defenders, or \$125 per hour. To achieve that would require an additional \$5.7M annually.

CAPITAL DEFENSE

Finally, in the Governor's Budget, OPD is budgeted for \$500,000 per year for the coming biennium for capital defense. Your subcommittee preliminarily granted OPD \$250,000 per year. OPD draft projections for capital defense indicate FY 13 actual YTD and projected through Jan-June to exceed \$1,200,000. That number does not reflect any of the costs to tax payers for the prosecution, law enforcement or the judiciary.

When adequate counsel is not provided to indigent defendants, individual liberty goes from being a right to a privilege available only to those who can afford it. There ought not be two tiers of justice- one for those of means and another for those without. We believe that it is unconscionable and unconstitutional to continue leaving OPD's under-resourced offices taxed with unmanageable caseloads.

For the sake of justice and fulfilling the legislature's good faith commitment to build and adequately fund a statewide public defender system, I encourage you to think and act boldly regarding the OPD budget. Demonstrate courage and leadership in making right in this budget the systemic shortcomings of underfunding that have persisted since OPD's inception.

Respectfully,

Scott Crichton

Executive Director

American Civil Liberties Union of Montana